

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
JOSE ZAVALA,  
Defendant.

Case No.: 13-cr-0608-GPC

**ORDER DENYING MOTION FOR  
REDUCTION OF SENTENCE  
PURSUANT TO 18 U.S.C. § 3582(c)(2)**

[ECF Nos. 31 & 38]

**I. INTRODUCTION**

On June 14, 2013, Jose Zavala (“Defendant”) was sentenced to a custodial term of 41 months for a conviction of importation of methamphetamine. (*See* ECF No. 28.) Defendant originally received a fast-track downward departure under USSG § 5K3.1. In 2014, the United States Sentencing Commission promulgated Amendment 782 (“Drugs Minus 2”), which, effective November 1, 2014, lowered the base offense levels for most drug quantities in USSG § 2D1.1(c), and made this change retroactive via Amendment 788. *See also* USSG § 1B1.10(c).

On November 13, 2014, Defendant filed a motion for reduction of sentence under 18 U.S.C. § 3582(c). (ECF No. 31.) The Court provisionally appointed Federal Defenders of San Diego, Inc. (“FDSDI”) to initially represent Defendant. (ECF No. 32.) On April 6, 2015, the Government filed its response asserting that Defendant is ineligible for any

1 reduction because the lower limit of the amended guideline range is not lower than  
 2 Defendant's originally imposed sentence. (ECF No. 33.) On May 27, 2015, Defendant  
 3 filed a second motion for reduction of sentence under 18 U.S.C. § 3582(c) (ECF No. 38),  
 4 which the government opposed on May 26, 2015 (ECF No. 36).

5 Finding that Defendant's current sentence is the lower than the low-end of the  
 6 amended guideline range, the Court **DENIES** Defendant's petition to reduce sentence.

## 7 **II. DISCUSSION**

### 8 **A. Modification of Sentence Under 18 U.S.C. § 3582(c)**

9 Generally, a federal court "may not modify a term of imprisonment once it has been  
 10 imposed." 18 U.S.C. § 3582(c). An exception to that rule lies "in the case of a defendant  
 11 who has been sentenced to a term of imprisonment based on a sentencing range that has  
 12 subsequently been lowered by the Sentencing Commission." § 3582(c)(2). When the  
 13 Commission makes a Guidelines amendment retroactive, 18 U.S.C. § 3582(c)(2)  
 14 authorizes a district court to reduce an otherwise final sentence that is based on the  
 15 amended provision. Any reduction must be consistent with applicable policy statements  
 16 issued by the Sentencing Commission. *Id.*

17 Amendment 782 to the United States Sentencing Guidelines, effective November 1,  
 18 2014, lowered the penalties for most drug offenses by reducing the offense level in the  
 19 § 2D1.1 Drug Quantity Table by two levels. In Amendment 788, the Sentencing  
 20 Commission decreed that Amendment 782 may be applied retroactively to lower the  
 21 sentences of previously sentenced inmates.

22 In *Dillon v. United States*, 560 U.S. 817, 826-27 (2010), the Supreme Court set forth  
 23 a two-step inquiry for assessing a motion for reduction of sentence under § 3582(c). *Id.*

24 At step one, § 3582(c)(2) requires the court to follow the Commission's  
 25 instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence  
 26 modification and the extent of the reduction authorized. Specifically,  
 27 § 1B1.10(b)(1) requires the court to begin by "determin[ing] the amended  
 28 guideline range that would have been applicable to the defendant" had the  
 relevant amendment been in effect at the time of the initial sentencing. "In  
 making such determination, the court shall substitute only the amendments

1 listed in subsection (c) for the corresponding guideline provisions that were  
 2 applied when the defendant was sentenced and shall leave all other guideline  
 3 application decisions unaffected.”

\* \* \* \* \*

4 At step two of the inquiry, § 3582(c)(2) instructs a court to consider any  
 5 applicable § 3553(a) factors and determine whether, in its discretion, the  
 6 reduction authorized by reference to the policies relevant at step one is  
 7 warranted in whole or in part under the particular circumstances of the case.

## 8 **B. Determination of Amended Guideline Range**

9 Under § 1B1.10, a defendant is eligible for a sentencing modification when an  
 10 amendment listed in § 1B1.10(d) lowers “the guideline range that corresponds to the  
 11 offense level and criminal history category determined pursuant to §1B1.1(a), which is  
 12 determined before consideration of any departure provision in the Guidelines Manual or  
 13 any variance.” USSG § 1B1.10 n.1(A). § 1B1.10(b)(2) confines the extent of the reduction  
 14 authorized. Once the Court determines the amended guideline range, it “shall not reduce  
 15 the defendant's term of imprisonment . . . to a term that is less than the minimum of the  
 16 amended guideline range.” *Id.* § 1B1.10(b)(2)(A). The only exception to this prohibition  
 17 applies if the defendant previously received a downward departure “pursuant to a  
 18 government motion to reflect the defendant's substantial assistance to authorities.” In that  
 19 case, the Court may apply “a reduction comparably less than the amended guideline range.”  
 20 *Id.* § 1B1.10(b)(2)(B).

21 As Amendment 782 is listed in § 1B1.10(d), the Court must determine the “amended  
 22 guideline range” that would have been applicable to the defendant had Amendment 782  
 23 been in effect at the time of the sentence. USSG § 1B1.10(b)(1). Defendant has calculated  
 24 his “amended guideline range” by including a reduction for the fast-track. Determination  
 25 of the “amended guideline range” is at the heart of the disagreement between the parties in  
 26 this case.

27 Defendant has calculated his “amended guideline range” by including a reduction  
 28 for the fast-track. Defendant argues this is the proper procedure because such a reduction

1 comports with the plain language of the Guidelines and the intent of Congress, and avoids  
2 absurd results. In the alternative, he asserts that § 5K3.1 motions should be included within  
3 § 1B1.10(b)(2)(B)'s exception because "fast track is precisely a form of 'substantial  
4 assistance' rendering analogous, institutional benefits."

5 The Court finds that Defendant's position is irreconcilable with the applicable  
6 Sentencing Commission comments. Note 1(A) to § 1B1.10 specifically states that the  
7 amended guideline range "is determined before consideration of any departure provision  
8 in the Guidelines Manual or any variance." § 1B1.10 n.1(A) (emphasis added). A  
9 commentary provision—such as Application Note 1, "which functions to interpret a  
10 guideline or explain how it is to be applied"—is binding as long as the Commentary does  
11 not conflict with the Constitution, a federal statute, or the guideline at issue. *Stinson v.*  
12 *United States*, 508 U.S. 36, 42-43 (1993) (internal quotation marks and alterations omitted).  
13 Thus, the Court may not factor in a "fast-track" or any other departure into the amended  
14 guideline range unless an exception exists.

15 The exception to this rule is found in § 1B1.10(b)(2)(B). Under § 1B1.10(b)(2)(B),  
16 reductions "comparably less than the amended guideline range" are permitted only in cases  
17 where the original term of imprisonment was below the applicable guideline range  
18 "pursuant to a government motion to reflect the defendant's substantial assistance to  
19 authorities." *Id.* § 1B1.10(b)(2)(B). Every circuit court that has addressed the issue agrees  
20 that § 1B1.10(b)(2)(B) bars a district court from lowering a defendant's below-guideline  
21 sentence unless the departure at his original sentencing was based on his substantial  
22 assistance to the government. *See United States v. Berberena*, 694 F.3d 514, 518-19 (3d  
23 Cir. 2012); *United States v. Anderson*, 686 F.3d 585, 588 (8th Cir. 2012); *United States v.*  
24 *Glover*, 686 F.3d 1203, 1207 (11th Cir. 2012); *accord United States v. Colon*, 707 F.3d  
25 1255, 1258 (11th Cir. 2013); *United States v. Lizalde*, 502 Fed. Appx. 655, 657 (9th Cir.  
26 2012) (unpublished); *United States v. Beserra*, 466 Fed. Appx. 548, 550 (7th Cir. 2012)  
27 (unpublished).

28 A § 5K3.1 "fast-track" motion is not a motion for substantial assistance. Unlike a

1 substantial assistance motion, it is limited to four levels and must be made pursuant to an  
2 early disposition program authorized by the Attorney General and the United States  
3 Attorney for the district in which the court resides. Unlike § 5K1.1, it does not require  
4 “substantial assistance in the investigation or prosecution of another person.” In addition,  
5 Note 3 to § 1B1.10 omits a § 5K3.1 motion as one for substantial assistance. Note 3  
6 specifically provides that “[t]he provisions authorizing such a government motion are  
7 § 5K1.1; (2) 18 U.S.C. § 3553(e); and (3) Fed R. Crim. P. 35(b).” *Id.* n.3.

8 Ultimately, the Commission decided to impose a “single limitation applicable to  
9 both departures and variances” in order to “avoid unwarranted sentencing disparities” and  
10 “undue complexity and litigation.” *Hogan*, 722 F.3d at 61. This decision limits the number  
11 of defendants who will be able to obtain relief under § 3582(c)(2) in light of the guideline  
12 amendments. The First Circuit has commented that it is “troubled by the extent to which  
13 the amended policy statement and Application Notes severely limit the number of  
14 defendants . . . who will be able to obtain relief” but recognized that “in these instances the  
15 district court's hands [are] tied.” *Id.* at 63.

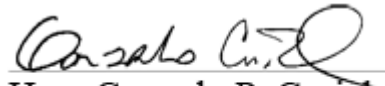
16 The present case involved the importation of 12.30 kilograms of methamphetamine  
17 mixture. Under the guidelines in effect at the time of sentencing, the base offense level  
18 was 36. The Court reduced the guidelines by 14 levels: 3 levels based upon mitigating role  
19 (§ 2D1.1(a)(5)); 2 levels for minor role (§ 3B1.2(b)); 2 levels under for safety valve  
20 (§ 2D1.1(b)(16)); 3 levels for acceptance of responsibility (§ 3E1.1(a) & (b)); and 4 levels  
21 for “fast-track” resolution (§ 5K3.1). The Court found that the adjusted offense level was  
22 22 and the applicable guideline range was 41 to 51 months

23 Applying the amended base offense level provided by Amendment 782, the base  
24 offense level is 34. Leaving all other guideline application decisions unaffected and  
25 removing departures and variances results in a reduction of 10 levels: 3 levels based upon  
26 mitigating role (§ 2D1.1(a)(5)); 2 levels for minor role (§ 3B1.2(b)); 2 levels for safety  
27 valve (§ 2D1.1(b)(16)); and 3 levels for acceptance of responsibility (§ 3E1.1(a) & (b)).  
28 The adjusted offense level is 24, the Criminal History Category is I and the applicable

1 guideline range is 51 to 63 months. In the instant case, Defendant received a below-  
2 guideline sentence based on “fast-track,” not substantial assistance to the government. To  
3 obtain relief under § 3582(c), the guideline amendments at issue must “lower[]” a  
4 defendant's applicable guideline range. U.S.S.G. § 1B1.10(a)(2)(B) (“A reduction in [a]  
5 defendant's term of imprisonment is not consistent with this policy statement and therefore  
6 is not authorized under 18 U.S.C. § 3582(c)(2) if . . . [the amendment] does not have the  
7 effect of lowering the defendant's applicable guideline range”). Here, they do not.  
8 Defendant’s amended guideline range is 51 to 63 months and he received a sentence of 41  
9 months. Since the lower limits of the amended guideline range is higher than the original  
10 sentence, Defendant is ineligible for modification of his sentence.

11 Accordingly, the Court **DENIES** Defendant’s motion for a sentence reduction under  
12 18 U.S.C. § 3582(c)(2).

13 Dated: October 27, 2015

  
14 Hon. Gonzalo P. Curiel  
15 United States District Judge  
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